In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1176

ERNEST W. MULLINS, JR., AND IVAN MULLINS,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 21, 1966. A petition for rehearing was denied on March 2, 1966. The petition for a writ of certiorari was filed on April 1, 1966. The jurisdic-

tion of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

1. Whether the indictment alleged that petitioners had acted wilfully in aiding and abetting in the misapplication of bank funds.

2. Whether the court's instructions to the jury on the element of wilfulness were proper.

3. Whether the trial court erred in disregarding part of the indictment as surplusage.

STATUTES INVOLVED

18 U.S.C. 2 provides:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. 656 provides:

> Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, national bank or insured bank, or a receiver of a national bank, or any agent or employee of the receiver, or a Federal Reserve Agent, or an agent or employee of a Federal Reserve Agent or of the Board of Governors of the Federal Reserve System, embezzles, abstracts, purloins or

willfully misapplies any of the moneys, funds or credits of such bank or any moneys, funds, assets or securities intrusted to the custody or care of such bank, or to the custody or care of any such agent, officer, director, employee or receiver, shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the amount embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

As used in this section, the term "national bank" is synonymous with "national banking association"; "member bank" means and includes any national bank, state bank, or bank and trust company which has become a member of one of the Federal Reserve banks; and "insured bank" includes any bank, banking association, trust company, savings bank, or other banking institution, the deposits of which are insured by the Federal Deposit Insurance Corporation.

STATEMENT

Petitioners, who were each charged in four counts of an eight-count indictment in the United States District Court for the Northern District of Indiana, were tried separately and convicted of aiding and abetting Glen B. Garrott, cashier of Farmers State Bank of Brookston, Indiana, in a wilful misappropriation of bank funds in violation of 18 U.S.C. 656 (E.A. 9, 11-14; I.A. 7, 9-12).[1] Ernest Mullins was

[1] "E.A." refers to Ernest Mullins' appendix in the court of appeals. "I.A." refers to Ivan Mullins' appendix in that court.

given concurrent sentences of imprisonment for two years on each of four counts (E.A. 111-112), and Ivan Mullins was given concurrent sentences of three years on each of four counts (I.A. 81-82). On appeal (E.A. 113-114; I.A. 83-84), both convictions were affirmed.

Count I, similar in form to the other seven counts, first alleged that Glen B. Garrott was the cashier of the Farmers State Bank and that "Ernest W. Mullins, Jr., and Ivan Mullins, doing business as Exterior Contracting Company, having aided and abetted the said Glen B. Garrott in committing an offense against the United States, are principals herein under the provisions of Section 2 of Title 18 of the United States Code." Paragraph 2 of that count alleged that Garrott and Ivan Mullins, "with intent to defraud * * * did wilfully misapply the sum of $45,000.00 of the moneys * * * of the Bank * * * in that Glen B. Garrott * * * did issue and deliver a Cashier's check drawn by the Bank upon itself, in the amount of $45,000.00 * * * payable to Exterior Contracting Company and endorsed Exterior Contracting Company by Ivan Mullins, when [each] * * * knew that said Cashier's check was issued without sufficient consideration * * * whereby the possession, control and use of the said sum of $45,000.00 of the moneys, funds and credits of the Bank were depleted and lost to the Bank and were then converted and misapplied to the use and benefit of Ivan Mullins, and diverse other persons to the Grand Jurors unknown * * *" (I.A. 9-10).

The evidence showed that Garrott, cashier of the family-operated bank, began his business association with Ernest Mullins in about 1948 or 1949 under the name of the G & T Manufacturing Company (E.A. 27, 44, 45, 54). The operation was financed by cashier's checks written by Garrott which were concealed by the use of "plugged" or fictitious bank figures (E.A. 58). Ernest Mullins thereafter started a new business under the name of Exterior Contracting Company, and hired his brother Ivan to work for Exterior for a $125 weekly salary (E.A. 65, 71; I.A. 35, 36). Although Garrott denied ownership or management participation in Exterior (E.A. 57), he continued to give financial assistance to Exterior through petitioners by using about $200,000 of his own money and $700,000 of the bank's money in paying Exterior checks drawn upon the bank without sufficient funds (E.A. 56, 63, 65; I.A. 45). Garrott also induced bank employees to enter "plugged figures" on the bank's accounts (E.A. 26, 28, 36; I.A. 17, 20, 23-24).

In 1962, Garrott, then without money of his own, devised and executed, with petitioners' knowledge, a "check kite" scheme for issuing the bank's cashier's checks for deposit by petitioners in out-of-town banks to cover Exterior's checks (E.A. 46-48, 67; I.A. 32-33, 39). The cashier's checks involved in the eight counts of the indictment (Gov. Exhibits 1 through 4 in each trial) were issued in April and May 1962 and were in amounts ranging from $42,250.00 to $110,000.00 (I.A. 9-12, 16, 25, 27; E.A. 11-14, 28-29,

44). On July 10, 1963, the bank shortage was approximately $569,596.82 (E.A. 39).

ARGUMENT

1. There is no merit to petitioners' contention that the indictment was defective because it did not charge them with having acted wilfully as aiders and abettors of Garrott's misapplication of the bank's funds. Although paragraph 1 of each count failed explicitly to use the word "wilfully," the second paragraph of each count alleged that Garrott and the petitioners "did wilfully misapply" the bank's money with intent to defraud (I.A. 9, 10, 11, 12; E.A. 11, 12, 13, 14). Nor is there substance to the claim that petitioners were charged under subsection (a) of 18 U.S.C. 2 in order to render proof of wilfulness unnecessary. The indictment, in its entirety, charged them with having wilfully aided and abetted in violation of subsection (a), not with having violated subsection (b).

2. The court instructed the jury that it could find petitioners guilty only if Garrott wilfully misapplied bank funds and if petitioners had aided and abetted Garrott wilfully to misapply the funds "with the specific intent to defraud the bank" (I.A. 63, E.A. 95-96). The court defined "wilfully" as follows (I.A. 63; E.A. 96):

> The word "wilfully" as used in the crime charged means that the act was committed voluntarily, with knowledge that it was prohibited by law, and with the purpose of violating the

> law and not by mistake, accident, or in good faith.

It defined "intent to defraud" as follows (I.A. 64, E.A. 96):

> The phrase "intent to defraud" used in the crime charged means that the act was done knowingly with the specific purpose to deceive in order to cause financial loss to another or financial gain to one's self.

Consequently, the instructions made it clear to the jury that petitioners could be guilty only if they intended to defraud the bank. There is thus no merit to petitioners' claim that the court failed to charge that "bad purpose or evil intent" was a necessary element of the offense (Pet. 14). The instruction concerning specific intent more than adequately supplied this element.

3. In counts relating to Ivan Mullins, the indictment, after charging that cashier's checks had been issued without sufficient consideration so that the bank's money was depleted and lost, further alleged that the money had been converted and misapplied to the "use and benefit of Ivan Mullins, and divers other persons to the Grand Jury unknown." The evidence failed to establish that Ivan, rather than Ernest, had been the direct beneficiary of the fraudulent cashier's checks. The district court, however, properly denied Ivan's motion for acquittal because the specific allegation was surplusage (I.A. 72-73). The offense was proved once it was shown that there had been a wilful misapplication of the bank's funds.

Who had received the direct benefit was immaterial. The court's action in disregarding the quoted phrase as surplusage was a permissible "judicial holding that a useless averment is innocuous and may be ignored." *Ford* v. *United States*, 273 U.S. 593, 602. The court did not strike words which altered the charge made in the indictment, as in *Ex parte Bain*, 121 U.S. 1, nor did it add to the allegations of the indictment so as to permit a determination of guilt on a charge different from that made by the grand jury, as in *Stirone* v. *United States*, 361 U.S. 212.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

MAY 1966

☆ U. S. GOVERNMENT PRINTING OFFICE: 1966 215701 771